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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,
Petitioner,
vs.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent's principal argument is that section 2(f) of the Robinson-Patman Act means something entirely different from what it says. First, it changes the words "prohibited by this section" to mean "prohibited by the main-enacting clause of section 2(a)", then it deletes the word "receive", and finally it adds some provisos.

Thus, for the purpose of this case, the Federal Trade Commission has rewritten section 2(f) to read as follows (the "legislative" legerdemain is indicated by deletions and italics):

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce ~~or receive~~ a discrimination in price which is prohibited by ~~this section~~ *the main enacting clause of section 2(a)*: *Provided, That nothing con-*

tained herein shall prevent a buyer from justifying such differentials by showing that they make only due allowance for the seller's differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such persons sold or delivered: . . .

I

The word "receive" is deleted by respondent in the following language: ". . . the buyer would not be responsible for prices which he receives in the ordinary course of business . . . even though some of those prices may actually be unlawful discriminations unless such discriminatory prices were the result of his own activities. . . . It follows, therefore, that the buyer needs to concern himself only with those lower prices in the granting of which he plays a significant part" (Comm. Br. p. 23).

The issue in this case is whether the buyer has "precisely the same burden of proving cost justification" as the seller, once it is shown that the buyer knowingly received a price differential (Opinion below, R. 522). For nearly ten years the Commission has so contended *in this case*.

Now the Commission abruptly modifies its position in presenting its case to this Court. It now advances for the first time, a new and novel theory. A buyer, says the Commission, may knowingly receive "unlawful discriminations" without violating 2(f), unless such discriminatory prices were the result of affirmative action on his part (Comm. Br. pp. 23, 25, 52).

The Commission's position is that mere affirmative solicitation of lower prices by the buyer constitutes the required "affirmative action" which shifts to the buyer the burden of proving his sellers' cost justifications (Comm. Br. p. 23).

In other words, *the buyer must not ask the seller for a lower price.*

With respect to this new position of the Commission, we invite the Court's attention to the following points:

1. Since the act specifically permits differentials in price and since the basic philosophy of the act is to encourage such differentials where economically justified,¹ logic compels the conclusion that Congress contemplated that such differentials would be granted as a result of the normal bargaining process. Sellers do not, out of the goodness of their hearts and without solicitation, grant lower prices just because they may lawfully do so.

2. The commission's new position, *i. e.*, that petitioner could have received lower prices without being put to the impossible burden of proving its sellers' cost justifications *if it had not asked for them*, constitutes an unequivocal admission that affirmance by this Court of the lower court's decision will destroy bargaining between buyers and sellers. For how can there be normal bargaining if buyers cannot ask for a lower price?

3. The commission now "ascribes to the word 'knowingly' the connotation of discriminatory prices resulting from special solicitation, negotiation, or other arrangement," *i. e.*, bargaining (Comm. Br., p. 52). But the decision of the court below is based upon no such novel connotation. It squarely holds that the act "places precisely the same burden of proving cost justification upon the buyer" as the

¹ The legislative history and the act itself disclose two complementary purposes: (1) Prohibition of price discrimination and (2) affirmative sanction of economically justified price differentials. The latter purpose as reflected in the cost justification proviso, was considered by Congress "of the greatest importance" and it was the firm intention of Congress that such differentials were not to be "in the remotest degree disturbed by this bill . . ." S. Rep. 1502, 74 Cong. 2d Sess. p. 5 and H. Rep. 2287, 74 Cong. 2d Sess. p. 17. See Pet. Br. p. 23.

seller. The lower court did not hold that this burden falls on the buyer *because he asked* for the lower price.

The Commission by now attempting to make the ultimate issue of buyer liability turn on the additional issue of solicitation gives the superficial impression that it is taking a more lenient position. But, the result is that it is attempting to make the fact of bargaining an indispensable element of violation. Thus, the Commission admits that the right to bargain over prices is the basic issue. However, no amount of repetition that petitioner asked for lower prices (based on cost savings) can cloud the fact that the narrow issue of statutory construction is whether the buyer must prove his sellers' cost justifications, whether he asked for or merely received lower prices.

Our position is that the significance to be attached to the fact that petitioner asked for lower prices based on cost savings is that it was attempting to adhere to the purpose and intent of the Robinson Patman Act.

4. The Commission purports to derive its new meaning for the word "knowingly" from a statement in the House Report with reference to the meaning of the word "knowingly" as used in Section 2(a) of the act. The meaning of the word in 2(a) cannot be equated to its meaning in 2(f).

Section 2(a) prevents price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . ." (Emphasis added.)

It will be noted that the word "knowingly" appears in the competitive effect clause of Section 2(a) dealing with injury to individual competitors. The House Report relied on by the Commission states that the purpose [for inserting the word knowingly] is to exempt from the meaning of the surrounding clause those who incidently receive dis-

discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement."²

This is grounded on the proposition that if a buyer does not know he is receiving a lower price than his competitor there is probably no competitive injury. Thus the word "knowingly" as used in 2(a) has a simple and easily ascertained meaning. On the other hand, "knowingly" as used in 2(f) qualifies the entire prohibition of that section and the question as to what is prohibited by Section 2(f) is the precise issue in this case. Once that question is determined the meaning of the word "knowingly" raises no problem. Therefore, what must be sought is enlightenment as to the precise prohibition of 2(f) and it cannot be found by reference to the meaning of the word "knowingly" in the competitive effect clause of 2(a). It is, however, found in the Congressional understanding of the meaning of "knowingly" as used in 2(f), the section of the act here involved.

Congressman Utterbach, in his statement on the Conference Bill said:

The closing paragraph of the . . . amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from the mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers. (Emphasis added).³

² H. Rep. 2951, 73d Cong., 2d sess. pp. 5-6.

³ 80 Cong. Rec. 9419.

Here we have a precise definition of the prohibition of the section at issue. It follows that no definition of the word "knowingly" as used in another section of the act can be given any weight as compared to the statement of the floor sponsor with respect to the specific section of the act to be construed.

II

Respondent's interpretation of the words "prohibited by this section" to mean "prohibited by the main enacting clause of section 2(a)", and respondent's addition of the provisos, pervade its entire argument. One illustration is as follows: ". . . Section 2(a) prohibits in general terms price discriminations which are likely to injure competition, and that while justification is permitted under the provisos of section 2(a), it is only an exception to the general prohibition Inasmuch as section 2(a) is the only part of section 2 which prohibits discriminations in price, it is clear that 'prohibited by this section' in Section 2(f) necessarily refers to discriminations prohibited by Section 2(a). A *prima facie* case of violation of section 2(f), therefore, consists of a showing of the same elements which make a discrimination in price violative of Sec. 2(a)" (Comm. Br. p. 20; see also pp. 35, 36).

Petitioner's position is that the words "prohibited by this section" mean exactly that, namely, prohibited by the four corollars of section 2(a) and not merely the enacting clause. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than due allowance for savings in cost, for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

Petitioner does not, as respondent suggests, indulge in differing definitions of similar statutory words. Our position simply is that there are no provisos in 2(f), and, therefore, the buyer does not have the burden of justifying

the receipt of a price difference by bringing himself within such non-existent provisos.

III

Two further arguments of respondent require comment. They would bring a wry smile to the face of one familiar with the administration and enforcement of the Robinson-Patman Act if they were not so fatal to our competitive system.

Respondent suggests that it should not be too difficult for a buyer to produce evidence of its sellers' costs (Comm. Br. pp. 41-43, 44-47). If one fact is notorious, above all others, with reference to the Commission's administration of the "due allowance" proviso, it is that the Commission has rejected the vast majority of the good-faith cost justifications that have been presented by sellers; only in the rarest of instances have sellers been able to meet the rigid cost accounting requirements laid down by the Commission.

Respondent refers on page 46 of its brief to a cost study presented by Minneapolis Honeywell-Regulator Company, a seller. This was the most elaborate, precise, detailed and expensive cost study ever presented in a Robinson-Patman case, and yet it dealt with only a portion of the discounts involved. In accepting this study the Commission admitted that the seller's "burden under the act is very great" (44 F.T.C. 351, 354). Now it reverses its field and suggests that it would *not* be difficult for a buyer, who has no access to the evidence, to do the same thing for a representative group of sellers.

Petitioner argues that where a buyer asks for lower prices based on cost savings that it necessarily follows that the buyer will be informed "of the seller's position on costs" and therefore if negotiations are honest "buyers do not stand in the position petitioner claims" (Comm. Br. p. 43).

This line of argument is patently unsound. It is absurd to assume that when a buyer, in the bargaining process, tells

the seller that he thinks he should have a lower price based on cost savings, the seller will immediately give him a cost analysis.

A buyer such as petitioner does not and, of course, cannot know how large a differential his seller can cost justify. He may know—as did petitioner herein—that he is entitled to a lower price in some amount. Therefore, he may estimate it in bargaining with his sellers, as petitioner did in this case. And when his seller gives him a lower price, whether on the basis of such estimated savings or not, the buyer has the right to assume, *in the absence of being informed to the contrary*, that the price given is lawful.⁴

The law does not require petitioner to examine its sellers' books or look for something to cast a suspicion on the legality of the price differential granted. *U. S. v. Detroit Timber & Lumber Co.*, 200 U. S., 324.

"There is a presumption that business is conducted lawfully . . . and that all things are rightly done . . . ; and where the act of a party may be referred indifferently to one of two motives, the law prefers to refer it to that which is honest, rather than to that which is dishonest . . ." *Fidelity & Deposit Co. v. Grand National Bank of St. Louis*, 69 F. 2d 177, 183; *Alexander v. Fidelity Trust Co.*, 249 F. 1, 11; *Boone County National Bank v. Latimer*, 67 F. 27, 30.⁵

A second Commission argument purporting to demonstrate the possibility of petitioner's presenting its sellers' cost justifications is the advancement of an astounding

⁴ This is in accord with the Congressional understanding as stated by Congressman Utterback. Section 2(f), he said, ". . . affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. . . . it enables him to charge them [buyers] with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 Cong. Rec. p. 9419 (Emphasis supplied).

⁵ "There is a presumption that every person has performed a duty enjoined by law or contract, unless the contrary appears."

simplification of what is required to cost justify price differentials. The new method of cost justification advanced is:

Even if the seller had said nothing whatever about his costs, still petitioner would have not been helpless. An examination of the items of savings claimed by petitioner will show this. Within a narrow margin of possible error the costs of shipping containers and the difference in carton costs on 24-count and 100-count packages can be ascertained by the buyer. The free deals referred to were public knowledge in the trade, and their terms were readily available to petitioner. The amount of the returns, allowances, and samples might vary considerably among sellers, but knowledge of the general policy of the particular seller in this area would afford a reasonable guide. Freight costs are available through published tariffs. The extent of any savings in sales costs is the least available of any of these items, but general knowledge of the trade affords a basis for approximating this if a margin for safety be allowed in the estimates. (Comm. Br. p. 42).

During the past 15 years the Commission has considered and rejected many cost studies. None has been accepted which even begins to approach the simplicity outlined above. Indeed, official pronouncements of the Commission state emphatically that "approximations and estimates" based on "general knowledge" are worthless.⁶

As early as 1938 the requisites of an acceptable cost study were set forth by the Chairman of the Commission, as follows:

Most concerns have known little about [distribution] costs. In preparing to justify their dis-

Athens Roller Mills Company v. Commissioner of Internal Revenue, 136 F. 2d 125, 128; *Planters' Operating Co. v. Commissioner of Internal Revenue*, 55 F. 2d 583, 586.

⁶"In formal proceedings before the Commission, where justification for price differences on the basis of cost differences is claimed . . . this claim must be substantiated by a detailed statement of costs of sales made to the several buyers or groups of buyers and of the analyses followed in finding those costs. Often it is necessary to make test studies in order to

counts under the act they have set out for the first time to discover the relative expense of packing full and broken cases, the expense attributable to paper work in placing and filling an order, the number of calls made per sale in serving different groups of customers and the average cost attributable to each call by a salesman.

Such information can seldom be derived from the present books of account. Packing costs have been determined by a stop-watch. Costs of handling invoices have been determined by counting the number of invoices or the number of entries for a period of time and attributing to each operation a charge based upon the personnel it took and the space it occupied during that period. Sales costs have been worked out by the timing of calls; the recording of the number of each type of calls made to each type of customer, the analysis of the comparative number of productive and non-productive calls, and the use of various devices for apportioning salesmen's salaries, commissions, and expense in accord with the facts discovered.

Since these methods of analysis are expensive, many concerns have done no more than select a sample territory or a sample period of time and to assume that the results of the sample are fairly representative of the rest of their business. *Of course, in instances where such sample studies have been offered to the Commissioner's investigational staff in justification of price differentials, a question has immediately arisen as to adequacy of these short-cut methods to show the relation of the costs to the discriminations* and the Commission's accountants have examined the books and the methods of doing business of the particular concern to determine whether the sample was fairly chosen and whether its results might be expected to be typical of the whole (Emphasis added).⁷

The Commission's suggestion for a simplified cost justification, which it adopts for the first time for the purpose of discovering reasonable bases on which allocations of joint costs may be made," FFC Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling (1941), H. Doc. 287, 77th Cong., 1st Sess. p. 17.

of this appeal, just does not square with 15 years of practice.

Indeed, if this simplified cost justification procedure were to be adopted, then petitioner's lower prices were, in many instances, actually proved to be cost justified by the Commission itself in its case in chief and the Commission should have made a finding to that effect.

The Commission's brief points to petitioner's estimate of cost savings in its negotiations with Schrafft (Comm. Br. pp. 11, 41-42). Schrafft examined petitioner's estimated costs savings and its treasurer testified, in response to questions put by the Commission Trial Attorney, that cost savings to Schrafft in selling petitioner were as follows:

Sales costs	6%	(R. 197)
Carton costs	2½	(R. 195)
Freight costs	3	(R. 197)
Total	11½%	

This would have justified a price of \$2.21 per hundred to petitioner whereas it paid \$2.22 (R. 266).

Respectfully submitted,

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⁷ Free, Accounting Problems Under the Robinson-Patman Act, 65 J. Accountancy 480.